Nos. 15,374 and 15,464

United States Court of Appeals

For the Ninth Circuit

RICHARD E. BENNETT, Administrator of the Estate of Evelyn E. Bennett, Deceased, *Appellant,* vs. ARCTIC INSULATION, INC., and DELBERT E. BOYER, Agent, Acting Within the Scope of His Employment, *Appellees.*	No. 15,374
RICHARD E. BENNETT, *Appellant,* vs. ARCTIC INSULATION, INC., and DELBERT E. BOYER, *Appellees.*	No. 15,464

Consolidated Appeals from the United States District Court for the District of Alaska, Fourth Judicial Division.

BRIEF FOR APPELLEES ARCTIC INSULATION, INC., AND DELBERT BOYER.

KIRKE LA SHELLE
of BRONSON, BRONSON & MCKINNON,
Mills Tower, 220 Bush Street, San Francisco 4, California,

CHARLES J. CLASBY,
MARY ALICE MILLER,
of COLLINS & CLASBY,
Polaris Building, 427 First Avenue, Fairbanks, Alaska,

Attorneys for Appellees Arctic Insulation, Inc., and Delbert E. Boyer.

FILED
SEP 17 1957

Subject Index

Page

Preliminary statement 1

As a matter of law, there is no cause of action for leaving a vehicle with the keys in the ignition, where the vehicle is stolen and the thief drives the vehicle negligently and injures other persons 4

A. The great weight of authority holds that there is no cause of action as a matter of law 4

B. The authorities are supported by reason, logic and justice underlying tort law 9

Plaintiffs' authorities and arguments fail to show that a cause of action exists 11

A. Plaintiffs' authorities do not support their contention 12

B. Plaintiffs' arguments that this court should not follow the majority jurisdictions are unconvincing 15

Conclusion 19

Table of Authorities Cited

Cases

Cases	Pages
Anderson v. Theisen, 43 N.W. 2d 272 (Minn. 1950)	5
Boland v. Love, 222 F. 2d 27 (C.A.D.C. 1955)	13
Casey v. Corson & Gruman Co., 221 F. 2d 51 (C.A.D.C. 1955)	5
Castay v. Katz & Besthoff, 148 So. 76 (La. 1933)	6, 16
Curtis v. Jacobson, 54 A. 2d 520 (Me. 1947)	6, 11
Erie Railroad v. Tompkins, 304 U.S. 64 (1938)	17
Fulco v. City Ice Service, 59 S. 2d 198 (La. 1952)	5
Galbraith v. Levin, 81 N.E. 2d 560 (Mass. 1948)	5
Garbo v. Walker, 129 N.E. 2d 537 (Ohio 1955)	12, 18
Garis v. Cherling, 71 S.W. 2d 215 (Tenn. 1934)	13
Gower v. Lamb, 282 S.W. 2d 867 (Mo. 1955)	5, 13
Holder v. Reber, 304 P. 2d 204 (Cal. 1956)	5, 6, 7, 18
Howard v. Swagart, 161 F. 2d 651 (C.A.D.C. 1947)	5
Jones v. United States, 175 F. 2d 544 (9th Circ. 1949)	17
Kiste v. Red Cab, 106 N.E. 2d 395 (Ind. 1952)	5
Lomano v. Ideal Towel Co., 51 A. 2d 888 (N.J. 1947)	13, 14
Lotito v. Kyriacus, 74 N.Y.S. 2d 599, affd. 80 N.E. 2d 542 (1948)	5, 18
Lustbader v. Traders Delivery Co., 67 A. 2d 237 (Md. 1949)	5
Maloney v. Kaplan, 135 N.E. 838 (N.Y. 1922)	13
Midkiff v. Watkins, 52 S. 2d 573 (La. 1951)	5, 6, 11
Morris v. Bolling, 218 S.W. 2d 754 (Tenn. 1948)	13
Ney v. Yellow Cab Co., 117 N.E. 2d 74 (Ill. 1954)	12
Ouellette v. Bethlehem-Hingham Shipyard, 73 N.E. 2d 592 (Mass. 1947)	6
Permenter v. Milner Chevrolet Co., 91 S. 2d 243 (Miss. 1956)	5, 6

Pages

Reti v. Vaniska Inc., 81 A. 2d 377 (N.J. 1951) 5, 16, 18
Richards v. Stanley, 271 P. 2d 23 (Cal. 1954)....5, 6, 7, 10, 13, 20
Richardson v. Ham Bros. Construction Co., 285 P. 2d 276 (Cal. 1956) 7, 13
Ross v. Hartman, 139 F. 2d 14 (C.A.D.C. 1943) 12, 14, 15
R. W. Claxton, Inc. v. Schaff, 169 F. 2d 303 (C.A.D.C. 1948) 15

Saracco v. Lyttle, 78 A. 2d 288 (N.J. 1951) 5, 6
Schaff v. R. W. Claxton, Inc., 144 F. 2d 532 (C.A.D.C. 1944) 14, 15, 17
Slater v. T. C. Baker Co., 158 N.E. 778 (Mass. 1927) 6
Sullivan v. Griffin, 61 N.E. 2d 330 (Mass. 1945) 6

Teague v. Pritchard, 279 S.W. 2d 706 (Tenn. 1954) 5
Tierney v. New York Dugan Bros., 41 N.E. 2d 161 (N.Y. 1942) 13

Wagner v. Arthur, 143 N.E. 2d 409 (Ohio 1956) 5
Walter v. Bond, 45 N.Y.S. 2d 378 (N.Y. 1943) affd. 54 N.E. 2d 691 (1944) 6, 16
Wannebo v. Gates, 34 N.W. 2d 695 (Minn. 1948) 5
Wilson v. Harrington, 56 N.Y.S. 2d 157 (N.Y. 1945), affd. 65 N.E. 2d 101 (1946) 6

Texts

Prosser on Torts (2d Ed. 1955) pages 141-142............ 8, 13

1 St. Louis Univ. Law. J. (1951):
Page 325 .... 8, 11
Page 329 11

26 Wis. Law Rev. 740, 745 (1951) 7

No. 15,374 and No. 15,464

IN THE

United States Court of Appeals

For the Ninth Circuit

RICHARD E. BENNETT, Administrator of the Estate of Evelyn E. Bennett, Deceased, *Appellant,* vs. ARCTIC INSULATION, INC., and DELBERT E. BOYER, Agent, Acting Within the Scope of His Employment, *Appellees.*	No. 15,374
RICHARD E. BENNETT, *Appellant,* vs. ARCTIC INSULATION, INC., and DELBERT E. BOYER, *Appellees.*	No. 15,464

Consolidated Appeals from the United States District Court for the District of Alaska, Fourth Judicial Division.

BRIEF FOR APPELLEES ARCTIC INSULATION, INC., AND DELBERT BOYER.

PRELIMINARY STATEMENT.

Appellants, plaintiffs below, filed two actions against appellees, defendants below, in the United States Dis-

trict Court for the Territory of Alaska. One action was for wrongful death and the other for personal injury, both resulting from an automobile collision which occurred on October 3, 1954. Defendants moved to dismiss both complaints. Briefs were filed with the District Court, and the Court heard the oral arguments of counsel. On November 20, 1956, and February 8, 1957, the District Court entered orders dismissing the complaints for failure to state a claim upon which relief could be granted, and judgments were entered for defendants.

Plaintiffs have appealed to this Court from the orders and judgments entered against them. The two appeals, presenting the same question of law, have been consolidated for hearing before this Court.

As this case is before the Court to review the order granting the motion to dismiss, the question for the Court's determination is whether the complaint states a claim upon which relief can be granted.

For the purpose of testing the sufficiency of the complaint to state a claim, the facts alleged are of course deemed admitted and all reasonable inferences are drawn in plaintiffs' favor. In their brief (pp. 29-32), however, appellants have gone beyond the facts alleged in the complaint. They have recited "facts" not before the Court, and they have drawn inferences and conclusions from these "facts" which are not justified. Defendants take exception to plaintiffs' recitation of alleged facts, inferences, and evidentiary matters. Defendants submit that the sufficiency of the complaint must be tested on the facts that are alleged

therein and the reasonable inferences to be drawn therefrom.

The complaint alleges that defendants left an unattended vehicle, with keys in the ignition, in an area of nightclubs in the city of Fairbanks, Alaska. It alleges that defendants should have foreseen that the vehicle might be stolen and that plaintiffs might be damaged thereby. The complaint further alleges that a third person stole the vehicle, drove it negligently, struck the plaintiffs, and caused their injury. The question presented for the Court's decision is whether these allegations state a claim upon which relief may be granted.

Plaintiffs are, of course, attempting to state a negligence cause of action. The *duty* underlying a negligence cause of action must be found either in the common law or in statutes of the jurisdiction. Research has disclosed no statute of the Territory of Alaska or the City of Fairbanks which prohibits the leaving of a vehicle with the keys in the ignition. On page 19 of their brief, appellants concede that they have been unable to find such a statute. In absence of statute, therefore, any duty which defendants owed to plaintiffs under the facts alleged must be found in the common law.

Thus, the issue for the Court's determination is: Whether, in absence of an applicable statute, there is a cause of action against a person who left his vehicle with the keys in the ignition, where a thief steals the vehicle, drives it negligently, and injures plaintiffs.

Defendants submit that *as a matter of law* there is no such common law cause of action; and therefore, the District Court was correct in dismissing plaintiffs' complaint. This conclusion is compelled (1) by the case authorities which have considered the identical question now before this Court, and (2) by the reason, logic and justice underlying tort law.

In order to demonstrate that the District Court correctly dismissed the complaint, defendants (1) will show the Court the vast body of law consistent with the dismissal, and (2) will show the Court that such a result is consistent with reason, logic and justice. Defendants will conclude by analyzing plaintiffs' authorities and arguments, and showing wherein they fail to support plaintiffs' contentions.

AS A MATTER OF LAW, THERE IS NO CAUSE OF ACTION FOR LEAVING A VEHICLE WITH THE KEYS IN THE IGNITION, WHERE THE VEHICLE IS STOLEN AND THE THIEF DRIVES THE VEHICLE NEGLIGENTLY AND INJURES OTHER PERSONS.

A. The Great Weight of Authority Holds That There Is No Cause of Action as a Matter of Law.

There are no reported cases in the Territory of Alaska dealing with the facts here involved. There are, however, numerous cases from other jurisdictions precisely in point. In all of these cases the defendant had left an unattended vehicle with the keys in the ignition; a third person had stolen the car, driven it negligently, and injured the plaintiff. The following

cases hold *as a matter of law* that under these facts there is no cause of action:

Holder v. Reber, 304 P. 2d 204 (Cal. 1956);
Wagner v. Arthur, 143 N.E. 2d 409 (Ohio 1956);
Permenter v. Milner Chevrolet Co., 91 S. 2d 243 (Miss. 1956);
Casey v. Corson & Gruman Co., 221 F. 2d 51 (C.A.D.C. 1955);
Gower v. Lamb, 282 S.W. 2d 867 (Mo. 1955);
Richards v. Stanley, 271 P. 2d 23 (Cal. 1954);
Teague v. Pritchard, 279 S.W. 2d 706 (Tenn. 1954);
Kiste v. Red Cab, 106 N.E. 2d 395 (Ind. 1952);
Fulco v. City Ice Service, 59 S. 2d 198 (La. 1952);
Reti v. Vaniska Inc., 81 A. 2d 377 (N.J. 1951);
Saracco v. Lyttle, 78 A. 2d 288 (N.J. 1951);
Midkiff v. Watkins, 52 S. 2d 573 (La. 1951);
Anderson v. Theisen, 43 N.W. 2d 272 (Minn. 1950);
Lustbader v. Traders Delivery Co., 67 A. 2d 237 (Md. 1949);
Galbraith v. Levin, 81 N.E. 2d 560 (Mass. 1948);
Lotito v. Kyriacus, 74 N.Y.S. 2d 599, *affd.* 80 N.E. 2d 542 (1948);
Wannebo v. Gates, 34 N.W. 2d 695 (Minn. 1948);
Howard v. Swagart, 161 F. 2d 651 (C.A.D.C. 1947);

Ouellette v. Bethlehem-Hingham Shipyard, 73 N.E. 2d 592 (Mass. 1947);

Curtis v. Jacobson, 54 A. 2d 520 (Me. 1947);

Sullivan v. Griffin, 61 N.E. 2d 330 (Mass. 1945);

Wilson v. Harrington, 56 N.Y.S. 2d 157 (N.Y. 1945), *aff'd.* 65 N.E. 2d 101 (1946);

Walter v. Bond, 45 N.Y.S. 2d 378 (N.Y. 1943), *aff'd.* 54 N.E. 2d 691 (1944);

Castay v. Katz & Besthoff, 148 So. 76 (La. 1933);

Slater v. T. C. Baker Co., 158 N.E. 778 (Mass. 1927).

In holding that as a matter of law there is no cause of action, the above Courts differ in the reasons for their opinion. One group (e.g., *Richards v. Stanley, Midkiff v. Watkins*) states that the defendant owes *no duty* to the plaintiff under these circumstances, i.e., that the defendant, *as a matter of law,* is *not negligent* in leaving his keys in his vehicle. The other group (e.g., *Permenter v. Milner Chevrolet Co., Saracco v. Lyttle*) states that even if defendant might be negligent in leaving his vehicle with the keys in the ignition, his act is, *as a matter of law,* not the *proximate cause* of the harm to plaintiff, i.e., the acts of the thief constitute an intervening and superseding cause. But, regardless of the differing rationale for the decisions, the cases have the same holding: these facts state no cause of action.

Of the above cases two were decided in states within the Ninth Circuit: *Richards v. Stanley* and *Holder v. Reber.* The *Richards* case is an exhaustive treat-

ment of the subject. In affirming a nonsuit, the California Supreme Court there held that the defendant owed *no duty* to protect the plaintiff from the acts of a thief. The plaintiff presented the same argument to the Court that plaintiffs are here suggesting: that negligence in such a case is a jury question. The Court rejected this contention and stated that the imposition of a duty under the circumstances is for the Court, not the jury. And this conclusion was reached in the face of the very arguments (advanced by dissenting judges) that plaintiffs here assert.

On pp. 27-28 of their brief, plaintiffs contend that the *Richards* case was overruled by *Richardson v. Ham Bros. Construction Co.*, 285 P. 2d 276 (Cal. 1956). However, the *Richardson* case concerned different facts, which the Court distinguished from the *Richards v. Stanley* holding. The later California decision of *Holder v. Reber,* 304 P. 2d 204 (Cal. 1956), followed the decision of the *Richards* case, and, concerning its possible modification said (p. 206):

> "The conclusion seems irresistible that the principles enunciated in the *Richards* case have not been modified."

The holding of the above body of case law that there is no cause of action as a matter of law has also found support in the text authorities:

26 *Wis. Law Rev.* 740, 745 (1951):

> "Regardless of what one prefers for the reason for denial of liability (i.e., no negligence, not a cause in fact, or no recovery for policy reasons)

> it is submitted that the owner should not be responsible. Would the courts impose liability on the owner if the thief were not negligent but merely involved in the accident with the plaintiff? Is a thief presumed to be a reckless driver? Does it make a difference that a thief is driving a car that hits the plaintiff? Whatever the reason given it does not seem that legal liability should attach to the act of leaving the keys in the car. Whether the court stresses lack of negligence, finds no cause in fact, or uses limiting policy factors, *the plaintiff should not get to the jury.*" (Emphasis added.)

A similar opinion is expressed in 1 *St. Louis Univ. Law J.* 325 (1951).

Prosser, *On Torts* (2d Ed. 1955) comes to the same conclusion. In discussing whether or not a defendant is obligated to foresee a third person injuring plaintiff, he states (pp. 141-142):

> "There is usually much less reason to anticipate acts which are malicious or criminal than those which are merely negligent. Under ordinary circumstances, it is not to be expected that anyone will intentionally . . . steal an automobile and run a man down with it."

And again, in discussing situations where the acts of a third person become a superseding cause, he states (pp. 275-276):

> "The same is true of those intentional or criminal acts against which no reasonable standard of care would require the defendant to be on his guard: . . . the theft of an automobile and running a man down with it . . ."

In their brief, plaintiffs have cited some of the above cases and have attempted to distinguish them. The distinctions are not real. The authority cited above compels the conclusion that plaintiffs have failed to state facts sufficient to constitute a cause of action.

B. The Authorities Are Supported by Reason, Logic and Justice Underlying Tort Law.

The foregoing authorities exist not merely as compelling precedents; the logic and justice underlying their conclusions are easily demonstrated.

It is axiomatic that the law of negligence is based upon the standard of a *reasonable* man.

Placing upon defendants the burden for which plaintiffs argue, would substitute a *guarantor* for the "reasonable man." Plaintiffs are asking the Court to permit the imposition upon defendants of the duty to (1) foresee that there will be drunkards and thieves in a public place on a Sunday morning; (2) foresee that one of such persons will commit a felony and steal the truck; (3) foresee that such a person after stealing the truck will drive it negligently; and (4) foresee that such a person will proximately cause plaintiffs' injuries. Defendants contend that such extension of the principles of foreseeability is unwarranted.

Further, defendants submit that even if such a compounding of circumstances *might* be foreseen or anticipated, the risk created is not *unreasonable.* As Prosser states in regard to foreseeing the acts of third persons (pp. 269-270):

> "The same is true as to those intervening intentional or criminal acts which the defendant might reasonably anticipate, and against which he would be required to take precautions. It must be remembered that the mere fact that misconduct on the part of another might be foreseen is not of itself sufficient to place the responsibility upon the defendant . . . Even though the intervening cause may be regarded as foreseeable, the *defendant is not liable unless his conduct has created or increased an unreasonable risk of harm through its intervention.*" (Emphasis added.)

See also *Richards v. Stanley,* supra, p. 26.

Defendants have not created or increased an *unreasonable* risk of harm. Even in leaving a vehicle where a thief might take it, there is little probability of harm to others. The dangers created are no more unreasonable than those incidental to the usual hazards of the road. Nor is defendants' act *unreasonable.* The leaving of keys in a truck is not an uncommon practice, particularly when the driver is making only a momentary departure, or is making a delivery, or has intentionally left the keys so that a third person might move the vehicle if necessary. Common experience shows that even the *inadvertent* leaving of keys in one's vehicle is not unusual. Such inadvertence is a relatively insignificant act when compared with the magnitude of the thief's acts and with the damage which plaintiffs are seeking to transfer to defendants.

Finally, it is a matter of common knowledge, and therefore of judicial notice, that automobiles may be started without keys; and that this is commonly done

by thieves. Removing the key does not insure against a theft.

Imposition of liability upon a vehicle owner in a case such as this would transcend negligence concepts and would go far in making the owner of a vehicle an *insurer* for all harms which his truck might cause. Such a severe liability has been rejected by the Courts (*Midkiff v. Watkins,* 52 S. 2d 573, 576 (La. 1951); *Curtis v. Jacobson,* 54 A. 2d 520 (Me. 1947); 1 *St. Louis Univ. Law. J.,* 325, 329 (1951)), and is indeed inconsistent with the basic concepts of the reasonable man, reasonable foreseeability, and unreasonable risks.

The authorities cited above, and the reason, logic and justice underlying their holdings, compel the conclusion that the facts alleged do not state a claim upon which relief can be granted.

PLAINTIFFS' AUTHORITIES AND ARGUMENTS FAIL TO SHOW THAT A CAUSE OF ACTION EXISTS.

Faced with the vast body of well-reasoned case law holding that there is no cause of action under the facts at bar, plaintiffs take the following courses of action: (A) They cite a number of decisions based upon different facts to induce a finding that they have stated a cause of action; (B) they present a variety of arguments in an attempt to convince the Court that it should not follow the established rule which destroys their position. We will now analyze plaintiffs' author-

ities and arguments, and will demonstrate that no basis is shown for a reversal of the trial Court's order.

A. Plaintiffs' Authorities Do Not Support Their Contention.

In an attempt to create a cause of action where the applicable authorities hold as a *matter of law* there is none, plaintiffs have cited a great number of cases. These cases are not applicable to the facts of this proceeding.

A number of plaintiffs' cases (pp. 5-12 of their brief) deal with *general* principles of tort law, rather than with principles of tort law applicable to the fact situation now before the Court. By and large, defendants concede the correctness of these decisions. But they are simply not applicable here.

Even those cases cited by plaintiffs which bear more closely on the facts before the Court (pp. 13-22) fail to support plaintiffs' contentions. They are distinguishable for several reasons:

(1) Some of plaintiffs' cases involve *violations of statutes* (*Garbo v. Walker,* 129 N.E. 2d 537 (Ohio 1955); *Ney v. Yellow Cab Co.,* 117 N.E. 2d 74 (Ill. 1954); *Ross v. Hartman,* 139 F. 2d 14 (C.A.D.C. 1943)). In these cases, a statute prohibited leaving a vehicle with the key in the ignition. The Courts found that the *statutes* imposed a civil duty upon the defendant, and that a violation of that duty constituted statutory negligence for which the plaintiff could recover. The *source* of the duty was the *statute.* Clearly such cases are not authority for the imposition

of a common law cause of action in the Territory of Alaska, where there is no such statutory duty.

(2) Some of plaintiffs' cases involve the acts of an *intermeddler,* rather than a thief. (*Lomano v. Ideal Towel Co.,* 51 A. 2d 888 (N.J. 1947); *Tierney v. New York Dugan Bros.,* 41 N.E. 2d 161 (N.Y. 1942); *Garis v. Cherling,* 71 S.W. 2d 215 (Tenn. 1934); and cases cited on p. 7 of appellants' brief.) That is, the third person was not a thief who committed a criminal act, but an intermeddler who accidentally set the vehicle in motion. There is a clear distinction between these cases. The negligent acts of an intermeddler are more readily foreseeable than the intentional acts of a thief. And the law may impose a greater duty upon the owner to foresee the possible negligence of an intermeddler than to foresee the wilful and malicious act of a criminal. *Richards v. Stanley,* supra; *Richardson v. Ham Bros. Construction Co.,* supra; *Gower v. Lamb,* supra; Prosser, *On Torts* (2d Ed. 1955), pp. 141-142. Because the acts of an intermeddler are more easily to be foreseen, such cases are not authority for a situation where the intervener was a wilful and malicious thief.

(3) Some of plaintiffs' cases are based upon liabilities other than leaving keys in a vehicle and the vehicle being stolen. In *Boland v. Love,* 222 F. 2d 27 (C.A.D.C. 1955) and *Morris v. Bolling,* 218 S.W. 2d 754 (Tenn. 1948), liability was predicated upon leaving the vehicles in the custody of persons known to be incompetent. The decision in *Maloney v. Kaplan,*

135 N.E. 838 (N.Y. 1922), was based upon negligence in improperly parking a car on a hill. And in *Lomano v. Ideal Towel Co.,* 51 A. 2d 888 (N.J. 1947), the defendant's negligence was in leaving his unattended vehicle in a place where *children* had tampered with vehicles on several prior occasions. The case at bar is one of leaving the keys in a truck where a third person steals the vehicle. Clearly the above cases are not authority for the imposition of liability under the facts of the instant case.

Plaintiffs have cited but one case which supports the proposition for which they are contending: *Schaff v. R. W. Claxton, Inc.,* 144 F. 2d 532 (C.A.D.C. 1944). This case holds that under the facts at bar the questions of negligence and cause are for the jury. Throughout the United States, it stands alone in the conclusion it reaches.

In the *Schaff* case, the defendant's driver left his truck in a parking space beside a restaurant. The driver left the truck unlocked and the keys in the ignition. An employee of the restaurant stole the truck, drove it negligently, and injured plaintiff. A directed verdict for the defendant was reversed on appeal, the Court holding that the questions of negligence and causation should be submitted to the trier of fact. The decision was two to one. The opinion of the majority was based upon a *dictum* in the case of *Ross v. Hartman,* supra, a case from the same jurisdiction which concerned a *statutory violation.* The dissenting justice contended that the Court's decision on appeal was

improper since the issue here had not been raised in the lower Court. The case was remanded to the trial Court, and the trial resulted in a verdict for the plaintiff. On appeal, the Court affirmed the lower Court's judgment, *R. W. Claxton, Inc. v. Schaff,* 169 F. 2d 303 (C.A.D.C. 1948). Again the decision was two to one. The dissenting justice argued that the decision was contrary to established law and that *Ross v. Hartman* was an improper authority upon which to base liability.

The *Schaff* case is wrong; it is contrary to all other cases on the point; it stands alone in its conclusion, and affords no sound reason for this Court to reverse the judgment of the District Court.

B. Plaintiffs' Arguments That This Court Should Not Follow the Majority Jurisdictions Are Unconvincing.

The overwhelming majority of counts which have considered the fact situation involved in the instant case have held that there is no cause of action as a matter of law. Plaintiffs have cited but one decision which supports their contention that negligence and cause are jury questions. Plaintiffs are therefore forced to argue that this Court should not follow the majority jurisdictions but should adopt the rule of the *Schaff* case. Several arguments are advanced in this attempt to dissuade the Court from following the clear weight of authority. Defendants will now consider these arguments:

(1) Plaintiffs argue (pp. 29-32 of their brief) that the area in which defendants' vehicle was left is one

frequented by drunkards, criminals, and other unsavory characters likely to steal trucks. They argue that this locale is *so different* from any involved in the other decisions that a different result is warranted.

Defendants wish to restate their objection that this part of plaintiffs' brief argues "facts" which are not before the Court and draws unjustified inferences and conclusions from these "facts." But even considering plaintiffs' "facts" on the merits, they do not warrant the adoption of a rule of law different from that recognized by virtually all jurisdictions which have considered the question at bar.

If Fairbanks is so different from other towns, undoubtedly the legislative authority would have passed a statute covering the facts of this case. The Court can hardly be asked to fix a purely local public policy which the legislature has not found to exist.

The cases cited in support of Appellees' position involved fact situations of infinite variety. Many involved situations *at least* as potentially inducive to theft as that alleged in this case, e.g., *Reti v. Vaniska, Inc.*, and *Walter v. Bond*, dealt with situations where persons actually *known* to be intoxicated were given the opportunity to steal the vehicles. And in *Castay v. Katz and Besthoff*, the vehicle was left in the City of New Orleans on the night of Mardi Gras. Is plaintiffs' alleged situation one of any more revelry and potential mischief than this setting? Other cases also involved the leaving of vehicles in areas where theft was likely. But in all these cases the result was the

same: no cause of action existed, as a matter of law. Even assuming for the purposes of argument that plaintiffs' "factual" inferences are justified, the situation alleged in their complaint and elaborated upon in their brief is not so different from those involved in the other cases to justify the adoption of a different rule of law.

(2) Plaintiffs argue (p. 29 of their brief) that reasonable minds have differed on the question of liability under the facts of this case; and therefore the issues of negligence and proximate cause should be submitted to the jury. However, reasonable minds have not differed. The overwhelming weight of authority (unanimous but for the *Schaff* decision discussed above), has held that there is no cause of action as a matter of law, and that there are no questions to be submitted to the trier of fact.

(3) Plaintiffs have made two references (pp. 25, 28) to the law of the "Federal decisions," apparently in an attempt to convince the Court that it is bound by the holding of the *Schaff* case, a decision of the Court of Appeals for the District of Columbia. However, it is settled that there is no Federal common law of torts, *Erie Railroad v. Tompkins,* 304 U.S. 64 (1938), and the Federal Court sitting as the Territorial Court of Alaska is not bound by the precedents of the District of Columbia. *Jones v. United States,* 175 F. 2d 544 (9th Circ. 1949).

(4) Plaintiffs have quoted extensively (pp. 16-18, 22, 33-34 of their brief) from cases discussing the

increased complexity of civilization and the increased hazards of motor vehicles. From this they argue that more dangers are to be foreseen.

Even assuming that life may have become more complex and to a certain extent more hazardous, the shifting of these hazards to others must still be in conformity with law. And while more dangers might be foreseen from this increased complexity of life, reasonable foreseeability is still the basis for imposition of civil liability. In order to shift a burden of loss, the law requires some *reasonable* degree of foreseeability and the creation of some *unreasonable* risk. Defendants submit that even assuming life has become more complex, such a compounding of occurrences as is involved in the instant case is not reasonably to be foreseen, and that whatever risk might *possibly* be created the risk is not *unreasonable.*

Plaintiffs' argument loses its force in the face of the fact that of the twenty-five cases which have held that there is no cause of action as a matter of law, *twenty* were decided *within the last ten years.* Is life any more complex, or are the hazards any greater, in Alaska in 1954 than in California in 1956 (*Holder v. Reber,* New Jersey in 1951 (*Reti v. Vaniska, Inc.*), or New York in 1948 (*Lotito v. Kyriacus*)?

Two of the cases from which plaintiffs quote for their dissertation upon the complexity of modern life (*Ney v. Yellow Cab Co., Garbo v. Walker*) are jurisdictions where the *legislature* expressed the public policy of the state by passing statutory prohibitions against leaving unlocked vehicles.

Plaintiffs' argument does not reach the reasoning or the effect of the authorities directly contrary to their position.

(5) Plaintiffs twice make reference (pp. 32, 33) to the tragic results of the accident of October, 1954. Defendants are the first to concede that death and injury from the negligent driving of a thief are personal tragedies which invoke the sympathies of any human being. But sympathy is not a basis of liability; and it does not authorize the law to shift the burden of that tragedy to other persons. Responsibility requires the finding of a *duty* owed to the unfortunate sufferers; some breach of that duty; and a causal relationship between the breach and the harm. These elements do not exist here.

Plaintiffs' arguments that this Court should not follow the overwhelming weight of case authority, authority which has given detailed consideration to the questions presented, and which has held that there is no cause of action as a matter of law, are not convincing.

CONCLUSION.

The question presented for the Court's decision is: whether, in absence of an applicable statute, there is a cause of action against a person who left his vehicle with the keys in the ignition, where a thief steals the vehicle, drives it negligently, and injures plaintiffs.

This question has been litigated on many previous occasions. The virtually unanimous body of decisions

has held that *as a matter of law* there is no cause of action. Defendants submit that this body of law governs the instant case. Defendants do not simply rely upon the vast numerical superiority of the decisions in their behalf; defendants have shown the Court that the decisions are in accord with reason, logic and justice.

In the final analysis, plaintiffs are asking the Court to write new law. Plaintiffs are contending that this Court should ignore the great body of law which has decided that there is no cause of action as a matter of law, and should declare a rule of liability which has been consistently rejected. Plaintiffs speak of the Court "expanding" existing law (p. 33), and of themselves as "pioneers" (p. 34). The Court is asked to write new law extending the substantive rights between individuals. Such a departure from existing law, and such a creation of new rights and liabilities is the function of the legislature (*Richards v. Stanley,* supra, p. 28).

In effect, plaintiffs are asking this Court to shift the burden of tragedy from one innocent person to another. This, of course, is not proper. Any such transferring of burdens must be to the body politic as a whole, and requires legislative, not judicial action.

Defendants respectfully submit that under the facts alleged in plaintiffs' complaint, and the reasonable inferences to be drawn therefrom, there is *as a matter of law* no claim upon which relief can be granted. It is therefore respectfully submitted that the decision

of the District Court for the Territory of Alaska be affirmed.

Dated September 14, 1957.

Respectfully submitted,
KIRKE LA SHELLE
of BRONSON, BRONSON & MCKINNON,
CHARLES J. CLASBY,
MARY ALICE MILLER
of COLLINS & CLASBY,
Attorneys for Appellees Arctic Insulation, Inc., and Delbert E. Boyer.